ADMINISTRATIVE APPEAL OF

JENNIFER RAE MCQUEEN, A MINOR,

BY HAZEL MCQUEEN, AS NEXT FRIEND

v.

CONFEDERATED SALISH AND KOOTENAI

TRIBES, FLATHEAD RESERVATION, MONTANA

IBIA 75-36-A Decided June 3, 1975

Appeal from the decision of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation denying the claim made by the appellant to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64).

Reversed.

1. Indian Tribes: Enrollment

   For purposes of which the tribe has complete control, the tribe conclusively

> determines membership: but where departmental action is authorized, the department may approve or disapprove the membership rolls of the tribe.

APPEARANCES: John Paul Jones, Esq., for appellant; Wilkinson, Cragun & Barker, by Richard A. Baenen, Esq., for appellees; Duard Barnes, Assistant Associate Solicitor for Indian Affairs for the Commissioner of Indian Affairs, Amicus Curiae.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

As a result of the successful prosecution of two claims against the United States in the United States Court of Claims, Congress provided for the distribution of judgment funds in the Act of March 17, 1972 (86 Stat. 64), which directed that 85 percent of the judgment funds "shall be distributed in equal per capita shares to each person who is enrolled or entitled to be enrolled on the date of this Act . . ."

Hazel McQueen, a duly enrolled member of the Confederated Tribes, as 11/16 degree Indian, filed an application as Next Friend, for enrollment of her daughter, Jennifer Rae McQueen. The birth certificate was returned to Hazel McQueen by the Tribal Council on April 19, 1972, because it erroneously showed her race to be white. Between April 19, 1972 and June 28, 1972, Hazel McQueen obtained a

corrected birth certificate showing her race to be Indian. The appellant was enrolled as a member of the Confederated Tribes on July 28, 1972.

The Tribal Council decided that Jennifer Rae McQueen was not entitled to receive a per capita share of the judgment funds as provided in the Act of March 17, 1972, because the Tribal Council had not received a proper application, and had not approved the enrollment of the appellant for purposes of the judgment distribution. Appellant's counsel on January 9, 1973, requested the Secretary to reverse the determination of the Tribal Council. The Secretary on January 25, 1974, did reverse the Tribal Council, holding the appellant had erroneously been denied a share of the judgment funds and directed "that necessary action be taken to pay Miss McQueen a share of the funds."

By memorandum of December 19, 1974, addressed to the Director of the Office of Hearings and Appeals, the Secretary in the exercise of authority reserved in 25 CFR 1.2 withdrew his decision in this appeal issued January 25, 1974, and at the same time submitted the matter to the Director for reconsideration and for final decision. Authority for determination of the appeal was transferred to this Board as an Ad Hoc Board by the Director's delegation of authority issued December 20, 1974.

Full and careful consideration has been given to the complete record, including briefs submitted by the appellant, the appellees and the Commissioner of Indian Affairs appearing as amicus curiae. We conclude the controlling issues to be:

1) Does the Secretary have jurisdiction over the matter in question?

2) Is the Secretary bound to follow his procedural rules as provided in 25 CFR Part 1, specifically 25 CFR 42?

3) Does the appellant qualify to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64)?

With respect to the first issue, the Board recognizes in the absence of express legislation by Congress that a Tribe as a political entity has complete control to determine all questions of its own membership. However, that power is qualified where the question involved is the distribution of tribal funds and other property under the supervision and control of the Federal Government.

[1] It appears that for purposes of which the tribe has complete control, the tribe conclusively determines membership; but where departmental action is authorized, the Department may approve or disapprove the membership rolls of the tribe. Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958).

We find that the Secretary of the Interior has jurisdiction over this matter and as trustee of the tribal assets has the responsibility of determining who is entitled to share in their distribution.

Is the Secretary bound to follow his procedural rules as provided in 25 CFR Part 1?

25 CFR provides that the Secretary can waive or make exceptions to his regulations where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians. We find that it is in the best interest of the Indians to waive the regulations in this matter.

Let us look finally to the question of whether the appellant qualifies to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972.

On March 17, 1972, the same date of the passage of the Act, the Confederated Tribes unanimously passed Resolution 4225 which provides in part:

> * * * that it is the Council's interpretation of the law that "those eligible for enrollment" means those children born too late to be included on the membership roll prior to payout time and for which application has not been previously made and acted on by the Tribal Council.

Tribal Ordinance No. 35-A unanimously passed and approved on November 3, 1961, provides in part the procedure for enrollment if the applicant is too young to act on his or her own behalf:

> A. Procedure for enrollment under Article II, Section 3 of the Constitution.
>
> The applicant, or next friend of applicant if applicant is too young to act on his own behalf, must:
>
> 1. Make formal application to the Tribal Council requesting enrollment as a member of the Confederated Tribes;
>
> 2. Show that he (or she) is a natural child of a member of the Confederated Tribes, giving necessary data on such parent;
>
> 3. Show that he (or she) possesses one-quarter degree or more blood of the Salish and Kootenai Tribes or both, of the Flathead Indian Reservation, Montana;
>
> 4. Show that he (or she) is not enrolled on some other reservation.

The appellant through her next friend, Hazel McQueen, stated that she filed her application for enrollment together with a copy of her birth certificate with the Tribal Council prior to the distribution of the judgment funds. Counsel for appellees in their letter of January 4, 1971, to John Paul Jones, Esq., appellant's attorney, admits that "Her application for enrollment was received before payment, but that the enrollment papers were not in order because her birth certificate listed both parents as white, thus making her ineligible."

We cannot agree that entitlement is predicated upon statements or misstatement made in a birth certificate. Certainly the Tribal Council was aware and on notice either through its own records or otherwise that Hazel C. McQueen was an 11/16 Indian enrollee of the Confederated Tribes. The misstatement in the birth certificate that the mother was white does not change the fact that she was and still is 11/16 Indian. The birth certificate further discloses the birth to Hazel C. McQueen of a daughter, Jennifer Rae McQueen, on March 2, 1972. As the record further shows, in the information supplied to the hospital for birth certificate, Hazel C. McQueen disclosed her color or race to be Indian.

We find that the appellant complied with both Tribal Ordinance No. 35-A and Resolution 4225.

F. J. Houle, Jr., Tribal Secretary, in his letter to appellees' counsel dated September 21, 1972, referring to the appellant, stated in the closing paragraph, "It may be construed that the girl is entitled to the money."

The submission of the corrected birth certificate to the Tribal Council did not make her any more entitled than she was when she submitted her application with birth certificate prior to payout time.

It is interesting to note the statement made by appellees' counsel in his letter of January 4, 1973, to John Paul Jones, counsel for appellant. He said in part:

> * * * Council members have a trust responsibility toward all tribal assets, and to vote to enroll a person whose birth certificate showed her to be ineligible would have been a violation of that trust * * *

What of the trust responsibilities owed Hazel McQueen and the infant Indian child?

We cannot agree with the conclusion reached by the Council. We conclude that the appellant complied with all the requirements for entitlement short of the ministerial act of being enrolled by the Tribal Council prior to payout time. Consequently, we find that the appellant is entitled to share in the judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64).

The appellees contend that it is not possible for them to pay the appellant her per capita share since they had paid out the 85 percentum decreed under the Act.

We do not agree. Section 1 of the Act states in part that:

> * * * the remainder may be advanced, expended, invested or reinvested for any purposes that are authorized by the tribal governing body and approved by the Secretary of the Interior.

Nonetheless, we conclude that the appellees' contention is of no consequence. We further conclude, the Tribes are obligated to pay the appellant her per capita share.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, is REVERSED, and the Tribal Council is DIRECTED to take the necessary action to pay the appellant, Jennifer Rae McQueen, her per capita share of the funds.

_____
Mitchell J. Sabagh
Administrative Judge

I concur:

_____
Alexander H. Wilson
Administrative Judge